

DEQ – Air Quality Division
SUMMARY OF NEGOTIATED RULEMAKING
DAIRY PERMITTING
DOCKET No. 58-0101-0502
January 19, 2006

PARTICIPANTS

Bauer, Martin – DEQ
Beard, Phyllis – Amalgamated Sugar
Brown, Cashia – Elmore County
Hayes, Justin – Idaho Conservation League
Haynes, Claudia - Canyon County
Kronberg, Lisa – Attorney General's Office
Ledbetter, Greg - ISDA
Louks, Bruce – DEQ
McClure, Ken – Givens Pursley
Naerebout, Bob – Idaho Dairywomen's Association
Olmstead, Brent – Milk Producers of Idaho
Patten, Marv – ISDA
Simon, Mike – DEQ
Smith, Toy – Northwest Dairy Association
Washburn, Courtney – Idaho Conservation League
Heitman, Phyllis – DEQ (Admin Support)

Martin Bauer called the meeting to order at 2:10 p.m., and the participants introduced themselves.

POINT VALUE FOR PERMIT BY RULE

Mr. Bauer stated that the last issue for the committee to address is the total point value needed for compliance. He reminded the group that at the last meeting he had suggested a value of 27 points. He opened the meeting for discussion. Justin Hayes said he continues to think that 27 is too low and the group needs to select a higher number. Ken McClure said that 27 is too high and the dairywomen would prefer a lower number.

Mr. Bauer said that the rule is going to be introduced to the legislature as the first air quality rule that is broader in scope than federal rules and therefore more stringent. It is likely to receive close scrutiny by the legislature. The rule is only going to be approved if the entire rulemaking group is in agreement. He said he suggested 27 at the last meeting because, point-wise, it cut the dairy industry in half – half appear to be above 27 and half are below. The upper half is in essence telling the lower half they must meet higher standards. He said he thinks it is a good place to begin and that the group should be unified before the legislature. Dairywomen and ICL can say it is not exactly what they want but it is a good place to start. The group can let the legislature know it

has a commitment from all parties to meet annually for the next three to five years to re-evaluate the rule.

Ms. Haynes said that in reviewing the total BMP values at the rated dairies, eleven would be in compliance and nine would not. She asked what the consequence is for the nine facilities. Mr. Bauer answered that the nine facilities will have a grace period in which to comply with the rule. They would accomplish this by implementing additional BMPs to bring their point total to that number required for compliance. She asked if this was feasible because she does not want to see any facility going out of business. Brent Olmstead said he does not think that will happen; however, these facilities may need to spend a considerable amount of money to reach compliance. Ms. Hayes said in particular she is concerned about the facilities that ranked at the thirteen-point level. She wonders if a BMP may have been omitted when the facility was scored. Mr. Bauer and Mr. Olmstead both agreed that dairies at this level will probably need to spend money to upgrade their dairies and, in fact, they should be expected to reach a higher standard. Mr. Patten concurred that the lower-scored facilities need to step up to the plate and improve their operations.

Mr. Bauer said he has given the points issue much thought and believes 27 is a good number. Bob Naerebout stated that this program is one all parties at these meetings have collaboratively established and the group should allow it to work. The program allows those who are below par to raise their standard. He acknowledged this rule is unique in the northwest and has not been done previously. Lisa Kronberg asked if the groups at this table are going to be able to help the dairymen obtain compliance and also to convince them to support this rule in the legislature. Mr. Naerebout said educating the dairymen about the rule and various options is going to be a big issue.

Ms. Hayes referred to the BMP list and the practices that were listed as "Not Used." She asked if the BMPs on the list are economically feasible for dairymen. Mr. Bauer said that in addition to the practices that are currently "not used," there are many BMPs that are feasible for dairymen to use. Mr. Olmstead stated that even though a particular BMP may not be used in Idaho, it is probably being used elsewhere in the country. The industry continues to look at these options and makes adjustments when possible. In three years, many BMPs not currently on the list may be available or existing practices may be re-designed into a new BMP.

Ms. Haynes asked how some dairies were able to reach the 52 or 54 point level while many other ones are so low. Mr. Patten said if you look at the points for the different BMPs and types of facilities, you will find the higher scored facilities are probably using the higher valued BMPs.

Mr. Patten said using this point system and requiring dairies to come up to a higher standard also allows them to be better dairymen for other reasons, such as animal health.

Mr. Hayes said he is still struggling with what is perhaps an inappropriate combining of all dairy types into the same category and expecting them to score at the same point total. There are a lot more options available to some types of dairies than to others. It could be real easy for a flush to get 40 points but still have a serious problem whereas it could be a lot more difficult for an open lot to get to 40 points. Mr. Bauer said that it was not the intention of this rulemaking group to establish an ammonia level or set any standard that limits ammonia emissions to a certain level. Instead this rule discusses the practices the dairyman can implement to limit the amount of ammonia emissions.

He added there was discussion about building a different point system for each of the three types of facilities. The group decided having different system would cause problems for the inspectors at dairies that fit into multiple categories – for instance at a facility that is a combination flush and dry lot where one type receives 30 points and the other 15 points. It would be a mathematical nightmare for both the inspector to determine compliance and for the dairymen to implement. Mr. Hayes said he is concerned the community would end up with many flush dairies that easily comply with 27 points, but because flush dairies produce more ammonia per cow, they are still big emitters. Mr. Olmstead added that the number of flush dairies has decreased over the past few years due the public opinion and many have converted to scrape dairies.

Again Mr. Bauer asked for consensus on a point value. Mr. McClure said the dairymen would not oppose 27 as long as ICL does not oppose it either. Mr. Bauer recalled a statement that Mr. Naerebout made earlier about the fact this group is creating a program that is brand new. He suggested the group put it in place with 27 points with the understanding point values will be reviewed in a year. Mr. Hayes said he thinks that 27 is too low but that he does not know how he can convince this group to raise it nor can he independently convince the legislature to make the group raise it. In regard to revisiting the rule next year, Mr. Hayes said it would provide a greater comfort level if the group should formalize its agreement to continue revisiting this rule over the next two or three years. Ms. Kronberg said it should not go in the rule. Mr. Hayes said even a letter would be sufficient. Mr. McClure stated the dairy associations would agree to return to the table; they have not failed to do anything they said they would do and they will not be absent next year. Ms. Kronberg said the burden lies with DEQ to notice another meeting. Mr. Hayes said Mr. McClure's statement of commitment is sufficient. Mr. Bauer said DEQ will formalize this in the guidance so that all concerned parties will be aware.

Ms. Haynes asked that the meeting minutes reflect that the total point value will also be discussed in future years and that scientific information that may become available will be considered. She said what she is looking for is having more to do with the volume of ammonia emissions – if all of a sudden twenty 10,000-cow dairies come into the valley and are all approved. What is this permitting processing going to do for the public if these twenty facilities comply with a 27 point value but the overall ammonia emissions have increased due to sheer numbers of cows. Mr. Bauer added there are mechanisms to deal with those issues. Depending on what airshed is involved, two or more dairies could cause big problems if the airshed goes into nonattainment or if a maintenance

plan is involved. If you have an airshed that is not in that situation, the issue may not exist.

Mr. Bauer said the entire rule, all the BMPs, and applicability will be open for discussion in future meetings. Mr. Louks said the science is a work in progress and it may be unrealistic to have expectations that one year from now it will be able to provide guidance. The national studies will take at least three years.

Mr. Bauer said DEQ will finalize the rule with 27 points; the guidance will be formalized with a commitment for future meetings for the next three to five years.

PERFORMANCE INCENTIVES

Mr. Bauer reminded the group that at the last meeting Bill Eddie and Justin Hayes suggested the idea of adding a performance incentives provision to the rule. The proposed language was circulated to the group for review and comment. Mr. McClure responded that conceptually the idea was good but the numbers would not provide an incentive. He summarized that the proposal was to provide a safe-harbor so that a dairy farm with a 60-point score would not be required to add BMPs if the number was raised prior to January 1, 2010. Mr. McClure read an e-mail containing his response to Bill Eddie:

"My apologies for taking so long; had a long time coordinating schedules. While we haven't run this by the boards to whom Bob, Brent and I report for official response, our initial reaction is that while incentives are a good thing, this one probably isn't. It costs a lot of money to do the things necessary to obtain BMP points under the rule. In most cases the points will become incrementally more expensive as the easier and cheaper things likely will have been done first. In order for those expenditures to make economic sense to a dairy, the benefits need to be commensurate with the costs. Setting aside the discussion of the numbers (60 vs. 27) the incentive you propose would go away by the end of 2009. That isn't a safe harbor that will remain safe for very long. Further, we don't anticipate (perhaps we are short sighted) that science will erode the ammonia reduction value of the BMPs so rapidly that 60 or more points today would become fewer than 27 in January 2010. In order for the incentive to be meaningful, the incremental BMPs should be closer to the number currently necessary. If the number is 27, 60 is too high. If the number is 27, then 35 or 40 would become much more valuable. If, at the same time, you extend the time period for which the safe harbor is effective, it will provide much more incentive for a dairy to spend money to do something legally unnecessary today to gain the benefit of protection against regulatory uncertainty tomorrow.

"There is nothing conceptually wrong with your idea. We just anticipate that the numbers won't incent the behavior you want. How about lowering the number to 35 and giving us a safe harbor for 30 years? Now there's an incentive!!"

Mr. Patten asked if this refers to protection at the state level only or would it extend to the federal level, assuming a federal rule is in place prior to 2010. Mr. McClure and Mr. Bauer agreed this would apply only to the state level.

After discussion, Mr. Bauer summarized that in order for the dairy industry to be in favor of adding performance incentives to this rule, ICL would need to lower the points and extend the years.

Mr. Hayes said the reason ICL made this proposal was so people would feel better about the new system and changes that may occur in future years. They made this proposal as a good neighbor initiative. They would like to have this program work well for people in the future. If the dairymen are not interested, then Mr. Hayes said the proposal can be removed from the table.

Mr. McClure proposed changing 60 points to 35 and changing 2010 to 2020. Mr. Hayes said he cannot do that because the time frame is too long.

Mr. Bauer said this is another topic that can be reviewed in a year. Mr. Naerebout said he appreciates the gesture and thinks it makes the program look like a stronger, better program. It shows Idaho is in the lead for everyone, but the dairymen do not think it will work as it is currently written.

Mr. Hayes stated the performance incentives should be removed from consideration at this time. Mr. Bauer agreed.

GRACE PERIOD TO COMPLY WITH RULE

Mr. Hayes asked about the length of the grace period to allow dairies to get into compliance.

Mr. McClure reminded the group that according to the lawsuit settlement agreement that started this rulemaking, ICL said it would not file complaints or seek actions against any dairy that did not have a permit to construct until July 1, 2006. The dairy associations' assumption is, depending on timing, the program will be in effect on July 1, 2006. Mr. Hayes concurred.

Ms. Kronberg said the rule will go before the Board on February 23, 2006 as a temporary rule with an effective date of July 1, 2006. According to the rule, dairies will have from the Board meeting until 15 days after July 1, 2006 to come into compliance. An inspection will be completed within 30 days from receipt of registration.

Mr. McClure asked if DEQ can accept registrations prior to July 1, 2006. Mr. Bauer said DEQ is able to accept applications prior to July 1, but DEQ cannot act upon the requests until that date. In accordance with the settlement agreement, the dairymen will be in compliance since they submitted their applications by July 1. If ICL has concerns about dairies being out of compliance, they could look to DEQ to act upon those registrations in a timely manner.

BMP CHART – FOOTNOTE

Mr. McClure said as a follow up to discussions at the last meeting, footnote #1 still does not say what he had intended. He suggested an additional revision to indicate that not doing your BMP when it is not practical is not failure to perform the BMP. Mr. Bauer agreed to the change.

DOCUMENTS FOR BOARD MEETING

Mr. Bauer said additional documents will be needed for the Board meeting on February 23, 2006:

- Guidance document
- Documentation for compliance with third-party exportation
- MOU with ISDA

Mr. McClure said he has met with opposition from the dairymen in regard to third-party export documentation. He drafted what he thought was a very simple paper for them to sign and was told they would not sign it. Mr. Hayes asked how ICL and the public would be able to see the third-party export document so they could determine if several dairies were exporting to the same third party. Mr. Bauer reminded him this group had already talked about this and they did not want to do anything at this point to discourage use of this practice. Mr. Hayes said he thought it would be a service to the public to be able to look at these agreements so they could be comfortable with the idea that this waste is in fact going to farms where it is being appropriately incorporated. Mr. Hayes added he does not think that ISDA is going to be able to monitor all the work of the dairies and the exporters. He wants to ensure that there is sufficient paper trail so the public will know this rule and the third-party's NMP are being complied with.

Mr. Patten said the ISDA inspection report will make reference to the BMP points awarded for third-party export and in the reverse will contain an explanation if the points are not given. Dairy farm checklists will not be a physical part of the report. The report will contain information about the BMPs used and points awarded.

Mr. Bauer said if it becomes too difficult for the inspectors to deal with the third-party export issues, this group will have the option of reviewing and deleting this practice from the BMP list in the future.

RULE EFFECTIVE BY LEGISLATIVE CONCURRENT RESOLUTION

Mr. McClure suggested that in lieu of going through APA announcements of temporary and proposed rules and final submission to the 2007 legislature, the dairy associations could approach legislative leadership and Legislative Services about having the 2006 Legislature approve by concurrent resolution, effective July 1, 2006. Mr. Hayes said ICL is in agreement with Mr. McClure's suggestion. Mr. Bauer said he prefers the rule go through public comment. Mr. McClure said it is possible that while the legislature can legally approve the rule by concurrent resolution, they may be uncomfortable doing that outside the APA process. Mr. Bauer added that 39-107D, Stringency, will also be a consideration with approving this rule since there is not an existing federal program.

FINAL ACTION ITEMS

- Revise BMP Chart, footnote #1; e-mail to group and ask for feedback by January 24
- Revise rule to include point value
- Prepare guidance document
- Determine documentation for compliance with third-party exportation
- Finalize MOU with ISDA

SCHEDULE FOR FUTURE MEETINGS

No additional meetings were scheduled.

The meeting adjourned at 3:30 p.m.